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In The

Supreme Court of the United States

October Term, 1994

OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS; THE CALIFORNIA STATE DEPARTMENT OF EDUCATION; THE CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF CALIFORNIA,

Petitioners,

vs.

BION JACKSON, a minor; ELIZABETH JACKSON; RICHARD JACKSON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. THE DECISION OF THE HEARING OFFICER IN THIS CASE IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND WAS ACCORDED DUE WEIGHT BY THE NINTH CIRCUIT.

2. THE ORDER PROVIDING FOR PAYMENT OF RENT, CARETAKER FEES AND MILEAGE ARE SUPPORTED BY "RELATED SERVICES" PROVISIONS OF THE I.D.E.A.

3. PETITIONERS HAVE UTTERLY FAILED TO CARRY THEIR BURDEN IN ATTACKING THE SPECIAL HEARING OFFICER'S DECISION IN THIS CASE.

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STATEMENT OF THE CASE

Respondents herein adopt the Ninth Circuit's "Factual & Procedural Background", Petition, pages 9a through 13a. In addition, respondents have included numerous documents in the appendix herein which respondents feel are important to the Court's understanding of the true facts as opposed to petitioners' version of the facts herein.

STATEMENT OF FACTS

Bion Jackson is a severely disabled male born February 12, 1979. Bion is blind and deaf as a result of rubella syndrome. He was hospitalized for the first two years of his life. Until age three, Bion was in a respite facility where his mobility was extremely limited. Due to Bion's physical problems, he has been developmentally disabled since infancy.

Educational Assessments of Bion Jackson:

Numerous assessments of Bion Jackson have been conducted over the years. The most recent assessment of Bion, for purposes of this appeal, was an assessment from the California School for the Blind ("CSB") dated January 1990. This independent assessment was ordered by Hearing Officer Fait in a previous administrative hearing held November 16, 1989 regarding proper assessment of Bion Jackson. In this 1990 assessment, the "CSB" made the following recommendations:

> " . . . Bion needs activities that are functional and meaningful to his immediate needs and

> capabilities . . . Since care givers are required to be in physical contact, one to one, teaching should be highly stressed. This approach could be best implemented within a program specifically designed for deaf blind students".

After reviewing each of Bion's Individual Education Plans (IEP) over the period 1982 to 1988 and the two previous assessments conducted in 1982 and 1990, the Hearing Officer in this matter concluded that after seven years in the public school system in Ventura, County, Bion Jackson still:

1. Does not have a language;

2. Is not toilet trained;

3. Has few self-help skills.

Administrative Hearing Evidence:

Based upon the Hearing Officer's review of:

(1) 1982 California School for the Blind Assessment;

(2) All IEPs and their supplemental documents;

(3) 1990 California School for the Blind Assessment;

(4) Oral testimony from all witnesses, the Hearing Officer concluded that Bion Jackson was ***not*** receiving the basic level of educational benefit contemplated by state and federal laws. The Hearing Officer also reasonably concluded that the evidence **did not** establish that Penfield School was a placement which would enable Bion to make necessary educational progress as is required by *Hendrick Hudson Bd. of Ed. Dist. v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Administrative Hearing Decision:

The Hearing Officer held:

> "In his school district placements, Bion has not benefitted educationally because he has not made satisfactory progress towards his IEP goals and objectives. The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit."

The Hearing Officer, pursuant to his official capacity and expertise on these matters determined that the evidence taken as whole indicated that another approach ***must*** be taken towards educating Bion Jackson. In so doing, the Hearing Officer ordered the plaintiff school districts to place Bion Jackson in a non-public educational facility for a period of one year.

Attempts to Locate an "Appropriate Placement":

In an attempt to locate an appropriate placement for Bion Jackson per the August 14, 1990 administrative order, Marty Babayco, as Director of Special Education for the Ojai Unified School District, undertook exhaustive attempts to locate an appropriate educational facility equipped to provide for Bion's educational needs. In a letter dated September 24, 1990 from Mr. Babayco to Raymond Brown as Hearing Officer, (Appendix A, attached hereto) Mr. Babayco indicated that the first institution which he contacted in his attempt to locate an

appropriate placement was the Foundation for the Junior Blind. The September 24, 1990 letter lists the numerous recommendations to the Foundation for the Junior Blind which were received by Mr. Babayco. The following individuals recommended the FJB as a proper placement for Bion Jackson: (1) Mr. Paul Starkovich, State Consultant for Non-public Schools referred Mr. Babayco to the FJB, stating that the FJB was the only non-public school with the type of services that could possibly serve Bion's needs; (2) Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services also recommended the FJB for Bion; (3) Ms. Susan White, Lead Educational Specialist, California Deaf/Blind Services – Southern California also suggested the FJB as an appropriate placement for Bion.

Administrative Supplemental Order:

After receiving the September 24, 1990 letter and other correspondence from Coleen Ashly (Advocacy Specialist for the Jacksons) regarding the FJB program and costs, the Hearing Officer submitted a supplemental order dated January 2, 1991. (Appendix B, attached hereto). In this order the Hearing Officer concluded that the Foundation for the Junior Blind ("FJB"), located in Los Angeles, California was the only facility qualified in the State of California to provide Bion Jackson with an appropriate educational setting as is required by state and federal law. This conclusion comported with the opinion of California State educational experts as evidenced in the September 24, 1990 letter.

In view of the fact that the FJB was the ***only placement for Bion Jackson***, the hearing ordered that Bion be

placed there in the day program and ordered the payment of "related services" to facilitate Bion's attendance in the day program until such time as Bion could be admitted in the residential program at the FJB.

The Ninth Circuit concurred in all respects with the Hearing Officer's decision in this case. The Ninth Circuit also made it clear that the "related services" such as caretaker fees, rent and food could not exceed the costs that would have been incurred had Bion been admitted in the residential program at the FJB. (See Petition, Appendix D, page 34a).

SUMMARY OF ARGUMENT

The petition herein offers no substantive issues but merely repeats those losing arguments which petitioners asserted before the Ninth Circuit. Petitioners also misstate and confuse the facts in the hope that this Court will grant review.

A true reading of the facts of this case reveals that the hearing officer determined after several days of fair "due process" hearings that the petitioner school district was not offering Bion an "appropriate education" at his current placement with the petitioner school district. Accordingly, the hearing officer ordered the petitioner school district to identify a non-public educational placement for Bion which could implement Bion's Individual Educational Plan. In accordance with the hearing officer's order, petitioner school district special education officials identified the Foundation for the Junior Blind (hereinafter

the FJB) as being the only educational placement in California that could effectively educate Bion as required by the I.D.E.A. After having received the petitioner school district's recommendation for the FJB, the hearing officer considered additional evidence and then ordered placement at the FJB day program. The facts also reveal that in order to effectuate placement at the FJB, the special education hearing officer determined that certain expenditures were ***temporarily*** necessary to immediately place Bion at the FJB in their day program until such time as space became available for a pure "residential placement" for Bion at the FJB.

REASONS FOR DENYING THE WRIT

1. THE DECISION OF THE HEARING OFFICER IN THIS CASE IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND WAS ACCORDED DUE WEIGHT BY THE NINTH CIRCUIT.

The Ninth Circuit stated in *Gregory K. v. Longview School Dist.*, 811 F.2d 1307 (9th Cir. 1987) as follows:

> "[3] As the Supreme Court has held, courts must give 'due weight' to judgments of education policy when they review state hearings under 20 U.S.C. § 1415(e). (citations). Citing *Rowley*, we have held that 'courts should not substitute their own notions of sound educational policy for those of the school authorities which they review." (811 F.2d at p. 1311)

In *Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988), the D.C. Circuit Court of Appeals took the lower district court to task for its unexplained preference for the conclusions of those who opposed the hearing officer's view. The D.C. Circuit reversed and remanded to the district court "for the district court to directly tackle the issue of whether the opposing parties' showing is enough to overcome the hearing officer's conclusion that the proposed placement was 'appropriate' as that term is used in § 1412(a)." In *Town of Burlington v. Dep't. of Ed.*, 736 F.2d 773, 792 (1st Cir. 1984), *affirmed*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the First Circuit Court of Appeals stated:

> "The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue." (736 F.2d at p. 792)

The court in *Burlington* (*supra*) also recognized that it is difficult to identify a significant federal interest in overturning a state administrative agency's supportable finding that one of its own school systems has not complied with state standards. (See 736 F.2d at p. 792). The First Circuit concluded that school systems have a "set of affirmative obligations" that are to be carried out under the "scrutiny of state educational agencies" and the federal and state courts are the last resort. (See 736 F.2d at p. 792).

This rule requiring a "limited review" in cases under 20 U.S.C. § 1415(e) was explicitly set forth by the Supreme Court in *Hendrick Hudson Bd. of Ed. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the seminal decision on the scope of judicial review under the Act. According to the Court in *Rowley* (*supra*) a court can ask only: (1) whether the State has complied with procedures set forth in the Act, and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefits. (See *Rowley* 102 S.Ct. at 3051). In *Bertolucci v. San Carlos Elementary School Dist.*, 721 F.Supp. 1150 (N.D.Cal. 1989) the U.S. District Court for the Northern District of California summarized the Supreme Courts' holding in *Rowley* by stating:

> "*Rowley* noted that the provision that a reviewing court base its decision on the preponderance of evidence is not an invitation for courts to substitute their notions of sound educational policy for those of the school authorities which they review. The Court reasoned that the requirement that courts receive the record below impliedly requires courts to give due weight to the administrative proceeding" (721 F.Supp. at p. 1154)

Here, the Hearing Officer determined after lengthy administrative hearings, that (1) the IEP for Bion Jackson was not reasonably calculated to provide Bion with an opportunity to benefit from education, and (2) that the appropriate placement for Bion was the Foundation for the Junior Blind (Appendix B).

From a review of the administrative records and the decisions made by the Hearing Officer in this case, one

cannot doubt that the two pronged analysis enunciated by the Court in *Rowley*, (*supra*) has been satisfied. This conclusion is further supported by the Ninth Circuit's decision in this case which adopts the Hearing Officer's decisions as being supported by a preponderance of the evidence. (Petition, Appendix D).

2. THE ORDER PROVIDING FOR PAYMENT OF RENT, CARETAKER FEES AND MILEAGE ARE SUPPORTED BY "RELATED SERVICES" PROVISIONS OF THE I.D.E.A.

Petitioners seek review of a Ninth Circuit decision which is firmly grounded in well established statutory and case laws which have addressed the scope of "related services" and the In-Lieu of Transportation costs which are appropriate under the Individuals with Disabilities Education Act. Respondents adopt the findings and reasoning of the Ninth Circuit on these issues as outlined in the Ninth Circuit's opinion. (Petition, Appendix D).

The special education Hearing Officer determined, after hearing a plethora of evidence on this issue, that the FJB was the ***only*** appropriate educational placement for Bion Jackson. Indeed, the petitioner school district's special education director, Dr. Marty Babayco, informed the hearing officer by letter on September 24, 1990 (See Appendix A) that he (Dr. Babayco) had consulted with numerous State of California Special Education specialists who had all identified the FJB as being the only placement that would meet Bion Jackson's special education needs as outlined in Bion's IEP It was also recognized by the hearing officer that Bion Jackson could not

travel the 85 miles from Ojai, California to Los Angeles, California on a daily basis to attend the day program. According to Bion's physician, such extensive transportation would cause medical difficulty for Bion (See Appendix B, page 8). Because of this travel limitation, it was deemed necessary that Bion reside close to the FJB in Los Angeles during the week and return home to Ojai, California on the weekends. Therefore, the hearing officer ordered that the petitioner school district pay for Bion's caretaking, rent compensation and food while Bion attended the day program at the FJB. (See Appendix B, page 8 through 9). Said order was only effective until the end of the 1990-91 school year. (Appendix B, page 11).

With the voluminous administrative record as a guide, both the Hearing Officer and the Ninth Circuit found that the petitioner school district's placement for Bion was not appropriate under the I.D.E.A. Further, both the Hearing Officer and the Ninth Circuit further concurred that Bion's placement at the FJB day program was correct and consistent with the purposes of the I.D.E.A. Respondents expressly adopt the findings and reasoning of the Ninth Circuit in this regard. (Petition, pages 27a through 35a).

The United States Supreme Court has held in *Rowley* (*supra*) that in order to satisfy its duty to provide a free appropriate public education, a state must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." (*Rowley* at p. 3049) The Act defines "handicapped children" as "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired,

or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (Supp.III 1985). The term "related services" is defined by the Act as follows:

> "(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services. . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." (20 U.S.C. § 1401(17)

In determining what is or is not a "related service", the Ninth Circuit held in *Clovis Unified v. Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990) that this analysis must focus on whether the expense is **necessary for educational purposes.** (See 903 F.2d at p. 643) In the instant case, the Hearing Officer ordered the payment of Rent, Caretaker and Food costs because it was necessary for Bion Jackson to relocate to the Los Angeles area in order to allow him to attend the FJB day program. This order was temporary until Bion could be accepted in the 24 hour residential program offered by the FJB. It is patently obvious that payment of these expenses is necessary to provide to Bion the access to education which the Act requires. In *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988), the Eleventh Circuit Court of Appeals affirmed the lower district courts finding that

the board of education pay to the parents of a handicapped child, all out-of-pocket expenses incurred in placing their child in a treatment center which was ultimately determined to be an appropriate placement. (See 853 F.2d at p. 857) The court in *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984) stated:

> "Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." (744 F.2d at p. 517)

With these cases in mind, the administrative hearings held in this matter determined that only ONE placement was appropriate for Bion, this placement was the FJB. In order to effectuate Bion's placement at the FJB, it was deemed necessary to temporarily incur the above referenced costs in order to effectuate the intent of the Act until such time when Bion could be admitted into the residential program.

Respondents contend the cost of a "second residence" also falls within the category of "**necessary for educational purposes**" costs and as such should be accorded "related services" status. (See *Clovis Unified* (*supra*) 903 F.2d at p. 643) The proposed "second residence" is the only way to make an "appropriate" educational environment available to Bion, an environment which he desperately needs. One would hope that "cost considerations" not be used in a fashion to prevent Bion Jackson, and other children like him, from obtaining what they are entitled to by the command of both federal and state law.

3. PETITIONERS HAVE UTTERLY FAILED TO CARRY THEIR BURDEN IN ATTACKING THE SPECIAL HEARING OFFICER'S DECISION IN THIS CASE.

In *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988), the Eleventh Circuit held that the party attacking the administrative hearing decision has the burden of proving that the decision is clearly erroneous. Respondents assert that the petitioners herein have not satisfied their burden to prove that the administrative hearing findings are clearly erroneous. Instead of offering facts in support of their petition, petitioners engage in factual fabrication. This fabrication is adequately revealed by reading petitioners' Statement of Facts and Conclusions of Law (See Petition, Appendix E) and comparing said document to the accurate facts as outlined in respondents' Objections to the Petitioners' Statement of Uncontroverted Facts and Conclusions of Law (See Appendix C, attached hereto).

4. CONCLUSION.

Respondents assert that the Hearing Officer's decision in this case was in response to the unique circumstances and special educational needs of Bion Jackson. Indeed, the Ninth Circuit recognized this fact when it held in respondents' favor and ordered placement of Bion Jackson in the day program at the Foundation for the Junior Blind. Four years have elapsed since the petitioner school district filed its lawsuit to obtain judicial review of the Hearing Officer's decision in this case. Respondents assert that it is time to implement this order and provide

Bion with the educational benefits which Congress intended him to receive in passing the I.D.E.A. It is hoped that the Court will recognize the validity of the Ninth Circuit's decision in this case and the unique circumstances presented by this case.

Due to the patent validity of both the Hearing Officer's decision and the decision of the Ninth Circuit, the petition for writ of certiorari must be denied.

DATED: August 5, 1994

Respectfully submitted,

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Counsel of Record
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APPENDIX A

OJAI UNIFIED SCHOOL DISTRICT
414 East Ojai Avenue • Post Office Box 878 • Ojai, California 93023 • (805) 640-4300

September 24, 1990

Raymond Brown
Hearing Officer
California Special Education Hearing Office
Institute for Administrative Justice
McGeorge School of Law
32009 Fifth Avenue
Sacramento, California 95817

RE: CASE NO: SN 313-89H
DECISION: BION JACKSON

Dear Mr. Brown:

The Ojai Unified School District and the Ventura County Superintendent of Schools have tried to comply with your order *"to identify a state certified nonpublic school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school."* However, it appears that no such nonpublic school is available or suitable with the requirements as ordered by your decision.

I called The Foundation for the Junior Blind (F.J.B.) in Los Angeles on September 4 and requested admittance for Bion Jackson. The Foundation for the Junior Blind, as you recall, was the mother's first choice for a nonpublic school during the hearing. The Director of Social Services, Ms. Marie Johnson, stated that their residential/school program is currently filled. She also stated they do not

have any vacancies, nor do they anticipate any with this year (Please see attached letter).

I have also contacted leading experts in the California State Department of Education, Department of Special Education for their expertise and guidance. Mr. Paul Starkovich, State Consultant for Nonpublic Schools stated that nonpublic school facilities were limited for severely handicapped individuals that required deaf/blind services. He referred me to the F.J.B. and said that was the only nonpublic school with the type of services that would possibly serve Bion. When asked about out-of-state schools, he again did not know of any on the state's certified nonpublic school list that would serve such a low functioning deaf/blind individual.

Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services recommended the F.J.B., but could not suggest any nonpublic school setting in the State of California or out of state that would serve such a low functioning deaf/blind individual. He suggested the state's special school, California School for the Blind.

Ms. Susan White, Lead Educational Specialist, California Deaf/Blind Services – Southern California, was contacted but could not suggest any nonpublic schools other than the Foundation for the Junior Blind. She felt he may be too low functioning for their program.

From the California School for the Blind, I talked to Dr. Peg Campbell, Assistant Superintendent, Steve Goodman, Admissions Director and Richard Russo, Assessment Director. Dr. Campbell and Mr. Russo were part of Bion's assessment team when he was assessed at the California School for the Blind. Neither had advice on

where to send Bion. Mr. Goodman also did not have any suggestions. When I asked about the possibility of Bion attending their school, all three stated that Bion's functioning level was too low for their type of program.

When I reported to Mrs. Jackson, Bion's mother, about the lack of placement options, she stated she wanted someplace in Southern California. She had also contacted the Foundation for the Junior Blind and found that they did not have any vacancies.

I have also contacted the Santa Barbara County Superintendent of Schools Office, Los Angeles Unified School District, and Los Angeles County Superintendent of Schools Office inquiring about their deaf/blind services. Ms. Audrey O'Neil, Director of Special Education for Santa Barbara County serves all severely handicapped children in special day classes on regular school sites with DIS services. They do not have any credentialed deaf/blind instructors. Ms. Julia Newman, Program Specialist with Los Angeles Unified reports that they have several special centers that serve deaf/blind students that are similar to the Pennfield school where Bion is currently enrolled. Los Angeles County Schools reported that they too are similar to what we have been currently providing – a Developmental Center for the Handicapped with Designated Instructional Services providing auxiliary deaf/blind services.

Attached is a chronology of the people and institutions I contacted in my search for a nonpublic school that would fit Bion's needs as identified by his IEP and your hearing order.

I am at a loss trying to locate a nonpublic school that will fit Bion's low incidence handicapping conditions that will meet the hearing order. Please advise me on how to proceed. If you have any questions or concerns regarding this matter, please call me at (805) 640-4300.

Sincerely,
/s/ Marty Babayco
Marty Babayco
Director of Special Education

cc Dr. Andy Smidt, Superintendent, Ojai Unified
Ms. Diana Novak, Director of Special Education, Ventura County
Dr. James Foster, SELPA Director, Ventura County

APPENDIX B

BEFORE THE
CALIFORNIA SPECIAL EDUCATION
HEARING OFFICE

IN THE MATTER OF: BION JACKSON, Petitioner, vs. OJAI UNIFIED SCHOOL DISTRICT AND VENTURA COUNTY SUPERINTENDENT OF SCHOOLS, Respondents.	CASE NO: SN 313-89H SUPPLEMENTAL ORDER

A TELEPHONE CONFERENCE HEARING WAS HELD ON: November 1, 1990, at 10:00 a.m.

Parties included:

Marty Babayco, Director of Special Education, Ojai Unified School District

Diana Novak, Director of Special Education, Ventura County Superintendent of Schools

Elizabeth Jackson, Petitioner's mother

Colleen Ashly, Petitioner's advocate

The purpose of this part of the hearing was to review the actions of the Ojai Unified School District in its attempt to implement the order of the Hearing Officer, dated August 14, 1990, which reads in part:

> Within 45 days from the date of this order, the Venture County Superintendent of Schools

> and the Ojai Unified School District are to identify a state-certified nonpublic school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school.

On September 27, 1990, the California Special Education Hearing Office, McGeorge School of Law, received a letter, with enclosures, dated September 24, 1990, from Mr. Babayco. The letter outlined the efforts of the Respondents to comply with the order of the Hearing Officer. The enclosures included a letter, dated September 17, 1990, to the District from Ms. Marie Johnson, Director of Social Services for the Foundation for the Junior Blind, and a chronology of contacts regarding a nonpublic school placement for Bion Jackson, which was dated September 24, 1990.

Mr. Babayco's letter indicated the Respondents were unable to place Bion in the California Foundation for the Junior Blind, as there were no vacancies, and the School did not anticipate any vacancies this school year. Ms. Johnson's letter supports this statement by Mr. Babayco.

Mr. Babayco's chronology lists the people and institutions he contacted in his search for a nonpublic school that would fit Bion's needs as identified by his IEP and the Hearing Officer's order. The chronology includes contacts with state and local officials familiar with special education programs in California and, in some instances, programs outside of California. Bion's parents were also contacted. Mr. Babayco closed his letter with the comment, in part: "I am at a loss to locate a nonpublic school that will fit Bion's low incidence handicapping conditions that will meet the hearing order."

On September 28, 1990, the Hearing Officer responded to Mr. Babayco's letter, by acknowledging receipt of the documents and asking for clarification on these two points:

> . . . First, in your search for the appropriate placement, did you limit your search to southern California, or did you canvass the entire State? Second, in the case of the Foundation for the Junior Blind, what period constitutes its school year, and does it anticipate a vacancy Bion could fill at the end of its school year, or is the waiting list of students so lengthy that Bion might not be accepted for a number of years?

On September 28, 1990, the Hearing Officer also sent a copy of Mr. Babayco's letter and enclosures of September 24, 1990, to Petitioner's parents and advocate, together with a letter of transmittal. A copy of the transmittal letter was sent to Respondents.

On October 12, 1990, a response to the Hearing Officer's letter of September 28, 1990, was received from Mr. Babayco, in which he stated his search for a state-certified nonpublic school included the entire state and all state-certified nonpublic schools outside of California. Mr. Babayco also reported that the Foundation for the Junior Blind's school year runs from September to June and they do not anticipate any vacancies during this school year. Mr. Babayco also argued that the limit of a fair hearing order was one year, and seeking placement options for the following school year would exceed the authority of the Hearing Officer.

The Hearing Officer was not suggesting a two-year order. The Hearing Officer was interested in determining

if a vacancy might occur sometime during the 1990-91 school year, in which case a modified order might be appropriate.

Mr. Babayco also stated in his letter that he had been in contact with Petitioner's mother and advocate regarding the possibility of home teaching in lieu of finding a nonpublic school. However, there was disagreement as to how much teaching time was needed and who would provide the home teaching. Mr. Babayco's suggestion was to provide a home teacher three-to-four hours a week and provide an aide three hours per day who would provide most of the instruction to carry out Bion's goals and objectives. Mr. Babayco also stated the home teacher and aide could be trained by the California Deaf/Blind Services Project to enable them to provide the necessary instruction for Bion.

On October 18, 1990, the Hearing Officer sent a copy of Mr. Babayco's letter of October 8, 1990, to Petitioner's parents and advocate.

No written documents were received from Petitioner as of November 1, 1990, the date of the first telephone conference.

On the occasion of the November 1, 1990, telephone conference, Petitioner's advocate, Ms. Ashly, stated she had contacted Mr. David Eagan, Director of the Foundation for the Junior Blind on October 31, 1990. Mr. Eagan told her that a teacher had just resigned and that when a replacement was hired, they would have a vacancy for Bion in the day class, but there were no vacancies in the residential program, and might not be for as many as

three years. Ms. Ashly stated she now had two possible optional placements for Bion.

Option 1: Utah School for the Deaf/Blind in Ogden, Utah. The school has daily and residential classes and has an opening. The residential placement is Monday through Friday. The school is closed on Saturday and Sunday. Mrs. Jackson has relatives in Ogden and would be willing to move to Ogden where she could take care of Bion on Saturday and Sunday during the school year.

Option 2: Foundation for the Junior blind day class in Los Angeles, California. This placement would involve one of Mrs. Jackson's daughters moving to Los Angeles near the school where Bion would be enrolled in the day class. The daughter would transport Bion to and from school and provide a residence for him on Monday through Thursday nights. Bion would have to be transported to Ojai on Friday afternoons where he would reside with his parents on Friday, Saturday, and Sunday nights, and then be returned to Los Angeles on Monday morning.

No cost estimates had been obtained for providing the services under options 1 or 2, which the School District requested be obtained in order to consider these options.

Mr. Babayco then suggested a third option:

Option 3: A home teaching proposal. This was the most recent program suggested by Mr. Babayco, after his determining there was no state-certified nonpublic school placement available. (Letters dated September 24, 1990, and October 8, 1990) Petitioner's advocate stated that the

District-proposed home school program, Option 3, was not appropriate as Bion would receive less education than when he was last in school.

Mr. Babayco and Ms. Novak stated they would require additional time and information about Options 1 and 2 before making a decision regarding the options. They also requested that the original placement they recommended, Penfield School in Ojai, now identified as Option 4 remain, under consideration.

Petitioner's advocate stated she would obtain cost estimates for Options 1 and 2 and forward them to Respondents and the Hearing Officer by December 1, 1990.

Petitioner and Respondents agreed that an OT evaluation was needed to determine why Bion has ambulatory problems and what, if anything, can be done to improve his capabilities. Bion is a client of the California Children's Services Program, which will be asked by Petitioner to provide the evaluation.

Ms. Ashly informed Respondents and the Hearing Officer that Bion was scheduled for surgery on November 29, 1990, at which time both of his eyes would be removed. He would not be available to receive education services until January 1, 1991.

The Hearing Officer stated he would convene another telephone conference hearing upon receipt of cost and program information.

On November 13, 1990, the Hearing Officer was informed that Respondents had filed an appeal of the August 14, 1990, decision in United States District Court

for the Central District of California. The appeal was filed prior to the administrative aspects of the hearing being concluded. The August 14, 1990, decision by the Hearing Officer contained a statement:

> "The Hearing Officer retains jurisdiction in this case until the nonpublic school is identified and Bion is placed there."[1]

Clearly, Bion had not been placed in a nonpublic school at the time of the District Court filing, and, in fact, Respondents had agreed at the time of the November 1, 1990, telephone hearing to the reconvening of the hearing, via telephone conference. The hearing was to be reconvened when Petitioners' advocate, Ms. Ashly, obtained cost estimates for a possible placement in the Utah School for the Blind and the Foundation for the Junior Blind day class in Los Angeles as requested by the School District. Advocate Ashly was given until December 1, 1990, to obtain the cost estimates and forward them to Respondents and the Hearing Officer.[2]

On December 13, 1990, the Special Education Hearing Office Calendar Clerk received a fax letter from Advocate Ashly, dated December 12, 1990, containing information and cost estimates for a placement in the day class at the Foundation for the Junior Blind. Ms. Ashley also reported that the Utah School for the Deaf/Blind option was no longer available as they would not accept out-of-state placements at this time.

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[1] *Page 15 of the August 14, 1990, decision.*

[2] *On November 28, 1990, Ms. Ashley requested a two-week continuance to December 14, 1990, which was granted to obtain the placement information.*

On December 17, 1990, the Hearing Officer was informed of the receipt of Advocate Ashley's letter, at which time he directed the Calendar Clerk to set up the telephone conference call hearing agreed upon at the time of the November 1, 1990, telephone hearing.

On December 18, 1990, a second telephone conference hearing was held. Those participating in the hearing were Mrs. Jackson, Ms. Ashly, Ms. Novak, Mr. Babayco, and the Hearing Officer.

Mr. Babayco, because of the filing of an appeal in the Federal District Court, was uncertain of his role at this telephone conference hearing. The Hearing Officer stated that no court order prohibiting the hearing had been received and that the Special Education administrative hearing had not been concluded, therefore, the hearing would continue. Mr. Babayco placed his objection in the record, which was acknowledged by the Hearing Officer.

Ms. Ashly again stated that the Utah School for the Blind, Option 1, was not available at this time. Ms. Ashly then reviewed the cost estimates she obtained for placement in the Foundation for the Junior Blind (FJB), pointing out the following salient factors:

1. The Foundation charges $96.25 per school day for day class students. This cost is the same during the extended school year. Ms. Ashly had computed 141 school days, for the remainder of the school year, including the extended school year, for a total of $13,577.25.

2. Caretaker costs were computed as follows: Mrs. Jackson's 24-year-old daughter, Susan, would act as Bion's caretaker during the

school week, charging $5.00 per hour, 7 hours per day (2 hours in the morning and 5 hours in the evening). Ms. Ashley stated that $5.00 per hour was in Petitioner's opinion a fair price for this service. No other information supporting this figure was presented. Susan would get Bion ready for school in the morning and receive him at home at the conclusion of the school day. Cost for 141 days is $4,935.00.

3. Rent compensation was computed at $300.00 per month. Bion would reside at his grandparents' home, which is approximately 20 miles from the FJB school. Both the caretaker, Susan, and Bion would reside at this home from Sunday night to Friday at the conclusion of school. Room space for Bion and Susan would be provided as well as appropriate facilities for their use, e.g., toilet, electricity, gas, water, cooking area. Three-hundred dollars ($300.00) for two persons was deemed to be a fair price by Petitioner. No other evidence was introduced relative to this point, other than a statement by Ms. Ashly that rooms closer to the school would be much more expensive. Cost for 7 months' rent would be $2,100.00.

4. Food costs were computed at $10.00 per day, $5.00 for Bion and $5.00 for the caretaker. Petitioner arrived at this cost by stating it was a fair price for two persons.

5. Transportation mileage was estimated by Petitioner at 65 miles each way, Ojai to Los Angeles, 130 miles round trip. The state rate of 22¢ per mile was used to compute the

transportation cost. 30 round trips or 130 miles x 22¢ = $858.00[3]

6. Ms. Ashly stated that FJB said they *may* need an additional aide to accommodate Bion's special needs. The FJB would not know if this was required until they worked with Bion; however, if determined to be necessary, the aide would be a requirement for Bion to attend school. An additional aide 6 hours per day at $7.00 per hour = $5,992.00.

7. The cost of bus transportation from Bion's proposed Los Angeles residence at his grandparents to the FJB school was not estimated. According to Ms. Ashly, a transportation contract between the FJB and the Los Angeles Unified School District would have to be arranged. Ms. Ashly was unable to obtain this information in time for this hearing.

8. The total estimate of costs submitted by Petitioner for placing Bion at the FJB for the remainder of the school year was $28,802.25, *plus the unknown bus transportation cost.*[4]

At the conclusion of advocate Ashly's review of the estimated costs to place Bion at FJB the Hearing Officer and Ms. Novak raised the issue of whether or not Bion is

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[3] *Ms. Novak estimated the distance from Ojai to Los Angeles is 85 miles, not 65. If Ms. Novak is correct, the cost would be 60 x 85 x 22¢ = $1,122.00.*

[4] *While not generally relevant to deciding the issue of placement and services for Bion, cost estimates were obtained to enable the Hearing Officer to evaluate the request for compensation for services provided by Bion's immediate family and to enable the School District to consider alternative cost saving measures.*

now receiving funds from a federal, state or county agency which could be used to offset some of the cost for Bion's caretaker, residence and food for the five days he would reside in Los Angeles. Ms. Jackson stated she received money from Alameda County for adopted child care. When questioned as to what the funds could be used for, Ms. Jackson stated they were unrestricted and discretionary funds; however, she could not point out the law which so stated. Ms. Ashly stated she would obtain a copy of the law involved and ascertain the amount of the subsidy and forward this information to the Hearing Officer as soon as possible.

Ms. Ashly stated she would also try to obtain a cost estimate for the transportation of Bion from his proposed Los Angeles residence to the FJB.

Mr. Babayco then raised the question of whether special education funds could be used to pay for items such as caretakers, rent and food.

Ms. Ashly stated that it would cost the District approximately $33,000.00 per year, plus extended year costs if Bion had been able to enroll in the FJB residential program and that Petitioner's proposal for the FJB day class was very reasonable in that it included some transportation costs.

The Hearing Officer questioned Mr. Babayco as to whether FJB was a state-certified nonpublic school, and he responded it was. Mr. Babayco also stated FJB had a credentialed deaf/blind instructor, however, other teachers had severely handicapped credentials for deaf or blind, similar to what the District offered at Penfield School. He also stated the District was willing to provide

an additional aide at Penfield School. The Hearing Officer pointed out that Penfield School had been found to be an inappropriate placement in the August 14, 1990, decision, hence the order for a nonpublic placement.

Regarding the FJB placement as being an appropriate placement, in Mr. Babayco's letter to the Hearing Officer dated September 24, 1990, he stated he had contacted leading experts in the California State Department of Special Education, including Mr. Paul Starkovich, State Consultant for Nonpublic Schools; Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services; and Ms. Susan White, Lead Educational Specialist, California Blind Services-Southern California, and they all had referred him to FJB as a possible placement for Bion.

It has been established to the satisfaction of the Hearing Officer that the FJB is an appropriate certified nonpublic school which can meet Bion's current needs in a safe environment, as stated in the August 14, 1990, decision.

The question of using special education funds to pay for caretaking, rent compensation and food is a separate issue which is addressed here.

In this case, if Bion is placed in the day class at FJB, transportation to Ojai and return each day would *increase* the time he is on a transportation vehicle compared to his original Boswell School placement. Bion's physician, Dr. Fran Larsen, has testified that for medical reasons he objected to the two hours per day Bion was in the transportation vehicle while attending Boswell School. Depending upon the correct distance between Ojai and

FJB, 65 or 85 miles, daily transportation to and from Los Angeles would substantially increase daily transportation time, which the Hearing Officer finds unacceptable.

Absent daily transportation from Ojai to the FJB, Bion must reside in Los Angeles, preferably near the FJB. Bion's grandparents live about 20 miles from the FJB, they have offered Bion and Susan, his caretaker, lodging and use of facilities for $300.00 per month, which appears reasonable considering general rent costs in Los Angeles.

Food costs of $5.00 per day for Bion appears to be for three meals per day which is very reasonable. The caretaker's meals should not be paid for from Special Education funds as the caretaker would have to eat, whether or not she was taking care of Bion, and is receiving caretaker compensation.

Transportation to Los Angeles from Ojai and return at a rate of 22¢ per mile is very reasonable. These particular trips would occur on weekends. Bion would leave Los Angeles on Friday evening and return on Sunday evening. With reference to daily transportation costs, Petitioner's advocate Ms. Ashly indicated in a letter dated December 19, 1990, that the A.P.T. Company will transport Bion from his Los Angeles residence to the Foundation for the Junior Blind and return him for $39.82 per day x 141 school days = $5,614.62 school year.[5]

In order for Bion to receive a free appropriate education, he will have to attend JFB as it is the *only* school identified which will meet his low incident needs, given

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[5] *Adding this sum to the previously estimated total cost of $28,802.25, (page 6) results in a new estimated total of $34,416.87.*

that the Penfield School has been found inappropriate and no other appropriate options were identified. The only opening in JFB at the present time is the five-day nonresidential program. Bion cannot be transported from Ojai to JFB on a daily basis for medical reasons. In order to receive a free appropriate education, Bion must reside in Los Angeles. Bion's parents have ten other children, some or all of whom are handicapped. It does not appear to be feasible for his parents to reside with Bion. The entire family, with possibly the exception of Mr. Jackson, would have to move to Los Angeles and find local housing. The aforementioned move would be at great expense to Petitioner's parents, if at all possible.

On December 19, 1990, the Hearing Officer received a copy of a letter by facsimile, of the same date, in which advocate Ashly provided information regarding the Aid to Adopted Parents Financial Assistance Program. This document was made a part of the record in this case.

Item #2 of the aforementioned document states that, "the financial assistance is for the child's needs above room and board."

Item #5 states, "the financial assistance is not intended for board and care costs at another facility providing services to the child."

Advocate Ashly's letter refers to California Administrative Code, Title 22, Division 2, Chapter 3, Subchapter 2, Article 7, Sections 30667, 30669, and 30671 as the authority for establishment of the funds.

The following U.S. Code section references from the Education of the Handicapped Act are applicable to this case.

20 U.S.C. Section 1400(c), which states:

> Purpose. It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) [20 USCS § 1412(2)(B)], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. Section 1401(a)(18), which states:

(18) The term "free appropriate public education" means special education and related services that –

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 USCS § 1414(a)(5)].

The following Code of Federal Regulations sections are applicable in this case.

34 CFR 300.13(b)(13) states:

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

34 CFR 300.302 states:

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child.

Petitioner has identified a solution to the residence problem by having Bion's sister move in with Bion's grandparents to act as Bion's caretaker and pay a nominal rental fee for the period of time the home is in use. Neither the sister nor the grandparents are required to provide this service as they are not legally responsible for Bion; therefore, reasonable compensation is justified which will then enable Bion to receive a free appropriate education.

It would logically follow that where Petitioner has identified the *only* appropriate program available to him,

cannot be admitted to the residential program because it is at capacity at the present time, and *can* enroll in an appropriate nonresident program at the same school, to deny him the reasonable rent compensation, food and caretaker fees which would enable him to attend school would deny him equal treatment from other handicapped children who are placed in the residential program. A distinction might be made if there were no nonresidential, appropriate program available; however, in Bion's case this is not so. Whether Bion spends the night at FJB (the residential program) or at his grandparents (the nonresidential program) should not affect his ability to receive the free approproate education to which he is entitled.

ORDER

The Ojai Unified School District and the Ventura County Superintendent of Schools are to enroll Bion in the California Foundation for the Junior Blind in Los Angeles day class for the period beginning January 7, 1991. Respondents shall pay school enrollment and tuition fees, transportation from Bion's Los Angeles residence to the Foundation for the Junior Blind and return each day. Respondent shall also reimburse Petitioner for one round trip per school week between Ojai and Los Angeles, caretaker fees at $35.00 per school day, rent compensation at $300.00 per month/or fraction thereof, and food costs for Bion at $5.00 per day. Reimbursement due Bion's grandparents for rent, and his caretaker's fees, and mileage allowance shall be paid once per month. In the event that an additional school aide is needed for Bion, that cost will be borne by the Respondents.

Within 15 days Bion's IEP will be amended to conform with this order.

This order is effective only until the end of the 1990-91 school year, including the extended school year.

Dated: January 2, 1991

/s/ Raymond Brown
Raymond Brown
Hearing Officer

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

OJAI UNIFIED SCHOOL DISTRICT AND VENTURA COUNTY SUPERINTENDENT OF SCHOOLS, Plaintiffs, VS. THE CALIFORNIA SPECIAL EDUCATION HEARING OFFICE (CENTER FOR ADMINISTRATIVE JUSTICE – McGEORGE SCHOOL OF LAW); RAYMOND C. BROWN, HEARING OFFICER; CALIFORNIA STATE DEPARTMENT OF EDUCATION; BILL HONIG, in his official capacity as STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF CALIFORNIA; BION JACKSON a minor; ELIZABETH JACKSON; RICHARD JACKSON, Defendants.	CIVIL ACTION NO. 90 4915 R **DEFENDANT JACKSONS' OBJECTIONS TO PLAINTIFF'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW** (Local Rule 14.6) (Filed Sept. 23, 1991)

Pursuant to Local Rule 14.6 defendants Bion Jackson, a minor, Elizabeth Jackson and Richard Jackson hereby state the following objections to the Proposed Statement of Uncontroverted Facts and Conclusions of Law which was prepared by plaintiffs following the granting of summary judgment on September 3, 1991.

OBJECTIONS TO PROPOSED STATEMENT OF MATERIAL FACTS:

(1) Plaintiff's Material Facts 2 and 3:

As to plaintiff material facts 2 and 3 defendants object on the grounds that the description of Bion Jackson's disability contained in plaintiff's material facts 2 and 3 is incomplete and not reasonably based upon the record herein. An accurate description of Bion Jackson's disabilities would include the following:

1. Bion Jackson is an 11 year old, severely disabled male, who is considered to have no vision or hearing as a result of rubella syndrome. (AHD of August 14, 1990, pages 3-4; Exhibit 1 to plaintiff's complaint; Letter of June 6, 1989, Dr. Fran Larsen, Exhibit A to AHT). Bion is lacking in any residual use of both vision and hearing. He is extremely limited in his ability to physically assess the environment. His experiences are limited to what is brought directly to him or what he is directly exposed to. Bion needs activities that are functional and meaningful to his immediate needs and capabilities. Because of Bion's sensory losses, tactual and kinesthetic communication appear to be the only modes of communication that have meaning to Bion. Since educators or caregivers are required to be in physical contact, one-to-one teaching

should be highly stressed. This approach could be best implemented within a program specifically designed for deaf/blind students. (1990 California School for the Blind assessment, AHT Exhibit 65; AHD August 14, 1990 page 9).

(2) Plaintiff's Material Fact No. 7:

Defendants object to material fact No. 7 on the ground that it erroneously states that Bion is functioning far below his chronological age. This is inconsistent with Bion's apparent ability to attempt and function in a swim tank, (AHT, Vol. IV, page 141, lines 17-28 and page 142, lines 1-12). It is also inconsistent with the testimony of Dave Gransee at the administrative hearing, that, in his opinion, Bion had the cognitive ability to learn sign language. (AHT Vol. II, p. 14, line 9)

(3) Plaintiff's Material Fact No. 9:

Defendants object to material fact No. 9 on the ground that it is misleading and appears to be false. Material fact No. 9 states that Saroulta Dala is an experienced and credentialed teacher. There is no cited testimony or evidence that supports any "special education" credentialed status, and Ms. Dala does not have a special education credential to teach either the blind or the deaf as is required by California Education Code § 44265.5. (AHD p.14).

(4) Plaintiff's Material Facts No. 17 and 20:

Defendants object to material facts No. 17 and 20 on the ground that said "facts" are misleading and incomplete. As to the reference to the California School for the Blind assessments a complete and accurate statement of

the California School for the Blind assessment would include the following as was stated by the Administrative Hearing Officer:

> "The two CSFB assessments reveal that, after seven years in the public school system in Ventura County, Bion still does not have a language, is not toilet trained, cannot feed himself, cannot walk, and has developed very few self-help skills. These facts exist despite the diligent efforts of school district staff to educate Bion." (AHD, August 14, 1990, page 12)

As to Material Fact 20, a complete statement of the Hearing Officer's conclusion is as follows:

> "In his school district placements, Bion has not benefitted educationally because he had not made satisfactory progress towards his IEP goals and objectives. The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit." (AHD, August 14, 1990 page 12).

(5) Plaintiff's Material Fact No. 21:

Defendants object to plaintiff's material fact No. 21 on the ground that it is incomplete and misleading and purposefully taken out of context of the administrative hearing decision of August 14, 1990. An accurate statement of the Hearing Officer's decision would include the following: "The due process hearing did not produce sufficient evidence to make a determination that the

Foundation for the Junior Blind (FJB) is an appropriate placement for Bion. It may well be an appropriate placement; however, the school district will have to determine if the FJB program can address the goals and objectives outlined in Bion's IEP of May 31, 1989, has the appropriate credentialed staff, has facilities which meet state and federal requirements, and has a place for Bion. (California Education Code 56366) Additionally, if the FJB is the appropriate placement, Bion should be in residence at least five days per week as transportation to and from Ojai each day would not meet his medical needs as described in Exhibit B and by Dr. Larsen" (AHD, August 14, 1990. page 15)

(6) Plaintiff's Material Fact No. 22:

Defendants object to plaintiffs material fact No. 22 on the ground that it is misleading, false and does not accurately represent the facts in this case. The decision of August 14, 1990 ordered as follows:

> "Within 45 days from the date of this order, the Ventura County Superintendent of Schools and the Ojai Unified School District are to identify a state certified non-public school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school." (AHD August 14, 1990, page 15)

In response to this order the school district contacted the Foundation for the Junior Blind (FJB) and were told by the FJB that no space was available for Bion in the residential program. It was later discovered that Bion could be accepted to the FJB in the day program in Los Angeles on a temporary basis until such time when Bion could be

admitted to the residential program. (Marty Babayco Letter dated September 24, 1990; AHD January 2, 1991 page 10-11)

Plaintiff's Material Fact No. 22 misrepresents the facts in this case. As of September 24, 1990, according to a letter written by Mr. Marty Babayco, Director of Special Education, the school district (Mr. Babayco) had received no less than three recommendations to the FJB as being the only program in the State of California which could meet Bion's educational needs. (Marty Babayco letter dated September 24, 1990). After consideration of Mr. Babayco's correspondence and correspondence from Coleen Ashly, Advocacy Specialist for the Jacksons, the Hearing Officer ordered placement of Bion Jackson in the FJB day program. (AHD January 2, 1991).

(7) Plaintiff's Material Facts No. 23, 24 and 25:

Defendants object to plaintiff's material facts No. 23, 24 and 25 on the following grounds. Due to the fact that the plaintiff school districts claimed inability to comply with the hearing officer's order of August 14, 1990, subsequent hearings by way of telephonic communication were necessary and were held in order to locate an appropriate placement for Bion Jackson in view of the fact the Hearing Officer determined Penfield School was not an appropriate placement for Bion. Plaintiffs claim that these telephone conferences held November 1, 1990 and December 18, 1990 were not part of the administrative hearing record. However, volume 6, page 1, line 2, Raymond Brown as hearing officer clearly specifies that the telephone conference was "a continuation of a hearing" and no objections were made by either party at that time.

At line 7, Mr. Brown also stated that the telephone conference was to "consider modification of a decision". Plaintiff's characterization of these telephone conversations as not part of the administrative hearing process is clearly incorrect, and contrary to the record.

(8) Plaintiff's Material Fact No. 27:

Defendants object to plaintiff's material fact No. 27 on the ground that it is incomplete and misleading. The January 2, 1991 "Supplemental order" states:

> "The Ojai Unified School District and the Ventura County Superintendent of Schools are to enroll Bion in the California Foundation for the Junior Blind in Los Angeles day class for the period beginning January 7, 1991. Respondents shall pay school enrollment and tuition fees, transportation from Bion's Los Angeles residence to the Foundation for the Junior Blind and return each day. Respondent shall also reimburse Petitioner for one round trip per school week between Ojai and Los Angeles, caretaker fees at $35.00 per school day, rent compensation at $300.00 per month/or fraction thereof, and food costs for Bion at $5.00 per day. Reimbursement due Bion's grandparents for rent, and his caretaker's fees, and mileage allowance shall be paid once per month. In the event that an additional school aide is needed for Bion, that cost will be borne by Respondents." (AHD January 2, 1991 page 11)

(9) Plaintiff's Material Fact No. 28:

Defendants object to plaintiff's material fact No. 28 on the ground that said "fact" is disputed, conclusionary and not supported by any fair reading of the evidence in

this matter. The factual assertion that the designated instructional services are adequate for Bion's needs is clearly in dispute. The hearing officer determined after considering the evidence presented on both sides, that the Penfield School program was insufficient and could not provide the minimum educational requirements required by Federal and State law. (AHD p.14). The hearing officer reviewed each of Bion's Individual Education Plans (IEP) as well as the two California School for the Blind assessments of Bion in making his determination of Bion's educational needs and the appropriateness of FJB as an educational program for Bion, as distinguished from retaining Bion in a Penfield School Placement. (AHD, August 14, 1990, page 13-14). The reference to DeAnza School is entirely improper in view of the fact that the DeAnza School was not in issue in the Administrative Hearing Proceedings below. Any reference to DeAnza is an improper extension of the scope of review in this matter which should be limited to the issues presented at the Administrative Hearing level.

(10) Plaintiff's Material Facts No. 29 and 30:

Defendants object to plaintiff's material facts No. 29 and 30 on the grounds that such assertion of fact is contrary to the Hearing Officer's determination which was reached after lengthy administrative hearings on the issue. Any references to DeAnza are improper in that such reference improperly extends the scope of review of this matter beyond the scope of the administrative hearing. As to the "appropriateness" of Penfield School the Hearing Officer held:

> "The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit." (AHD August 14, 1990, page 14)

As to references to the declarations of Marty Babayco, Diana Novak and the IEP dated June 3, 1991, defendants incorporate the objections thereto which were filed with the District Court as DEFENDANTS JACKSON MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO DECLARATIONS OF BABAYCO AND NOVAK AND EXHIBIT 1 TO NOVAK'S DECLARATION IN CONNECTION WITH PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

OBJECTIONS TO PROPOSED CONCLUSIONS OF LAW:

(11) Plaintiff's Conclusion of Law No. 1:

Defendants object to Plaintiff's Conclusion of Law No. 3 on the ground that it contains an inaccurate statement of the law in regard to the standard of review in cases under the Individuals With Disabilities Education Act (IDEA). Section 1415(e)(2) of the IDEA was interpreted as to the standard of review by the United States Supreme Court in *Hendrick Hudson Bd. of Ed. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Here the Court rendered the seminal decision on the

scope of judicial review under the Education of Handicapped Act now referred to as the (IDEA). *Rowely* (supra) rejected the argument that section 1415(e)(2) gives district courts broad powers to overturn decisions regarding the selection of programs for the handicapped. Plaintiffs base federal district court review of this matter on 20 U.S.C. § 1415(e)(2) which states in pertinent part:

> " . . . the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." (20 U.S.C. § 1415(e)(2)

The United States Court of Appeals in *Town of Burlington v. Department of Educ., Com. of Mass.*, 736 F.2d 773 (1st Cir. 1984) Affirmed 471 U.S. 359 (1985) defined the standard of review for the district court in cases under the Act. The court stated:

> "We believe that the key to the review authorized by the Act lies in the additional evidence clause. We construe "additonal" in the ordinary sense of the word, *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1980), to mean supplemental. Thus construed, this clause **does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony**; this would be entirely inconsistent with the usual meaning of 'additional'. We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. (citation)" (736 F.2d at p. 7909) (emphasis added)

The holding in *Burlington* (supra) is further supported by subsequent cases on the issue. In *Roland M. v. Concord School Committee* 910 F.2d 983 (1st Cir. 1990) the court ruled that in review of individualized education program (I.E.P.) under the Act, the district court did not abuse its discretion in refusing to allow testimony of parent's expert witnesses who had not testified in the administrative hearing process even though they had been given every opportunity to present the desired testimony at the administrative level.

(12) Plaintiff's Conclusions of Law No. 4 and 5:

Defendants object to plaintiff's conclusions of law No. 4 and 5 on the ground that said conclusions of law do not represent an accurate statement of the law in regard to the standard of review under the Act (IDEA). Proceedings under section 1415 are to be in the nature of review rather than trial *de novo. David D. v. Dartmouth School Committee*, 775 F.2d 411, 424 (1st Cir. 1985), *cert. denied* 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986). This rule requiring a "limited review" in cases under 20 U.S.C. § 1415(e) was explicitly set forth by the Supreme Court in *Rowley* (supra), the seminal decision on the scope of judicial review under the Act. According to the Court in *Rowley* (supra) a court can ask only: (1) whether the State has complied with procedures set forth in the Act, and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefits. (See *Rowley* 102 S.Ct. at 3051) The Court concluded in saying, "If these requirements are met the State has complied with the obligations imposed by Congress and the courts can require no more." (See *Rowley* 102 S.Ct. at 3051)

(13) Plaintiff's Conclusion of Law No. 8:

Defendants object to plaintiff's conclusion of law No. 8 on the ground that said "Conclusion of Law" is nothing more than an argumentative unsupported conclusion which is not based upon any evidence which was before the court. The only additional evidence upon which plaintiffs could rely, in formulating such conclusions, are the declarations of Diana Novak and Marty Babayco and IEP dated June 3, 1991. These items should not have been considered because such evidence constitutes improper "embellishments" of the administrative record and as such are beyond the scope of review in these types of cases under the Act. (See *Town of Burlington v. Department of Educ., Com. of Mass.*, 736 F.2d 773 (1st Cir.1984) Affirmed 471 U.S. 359 (1985) Additionally said declarations were subject to the evidentiary objections heretofore filed with the court on August 23, 1991.

(14) Plaintiff's Conclusion of Law No. 9:

Defendants object to plaintiff's conclusion of law No. 9 on the ground that said "Conclusion of Law" is also nothing more than an argumentative unsupported conclusion which is not based upon any evidence which was before the court. The Hearing Officer's decision as to the appropriateness of the FJB was supported by a preponderance of the evidence. It was only after the Hearing Officer determined that Penfield School could not provide Bion with an "appropriate education" that he ordered the School District to locate an appropriate placement for Bion. In an attempt to locate an appropriate placement for Bion Jackson per the August 14, 1990

administrative order, Marty Babayco, as Director of Special Education for the Ojai Unified School District, undertook exhaustive attempts to locate an appropriate educational facility equipped to provide for Bion's educational needs. In a letter dated September 24, 1990 from Mr. Babayco to Raymond Brown as Hearing Officer, (said letter was attached to Administrative Hearing Pleadings and Correspondence and made a part of the record herein) Mr. Babayco indicated that the first institution which he contacted in his attempt to locate an appropriate placement was the Foundation for the Junior Blind. The September 24, 1990 letter lists the numerous recommendations to the Foundation for the Junior Blind which were received by Mr. Babayco. The following individuals recommended the FJB as a proper placement for Bion Jackson: (1) Mr. Paul Starkovich, State Consultant for Non-public Schools referred Mr. Babayco to the FJB, stating that the FJB was the only non-public school with the type of services that could possibly serve Bion's needs. (September 24, 1990 letter, paragraph 3), (2) Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services also recommended the FJB for Bion. (September 24, 1990 letter, paragraph 4), (3) Ms. Susan White, Lead Educational Specialist, California Deaf/Blind Services – Southern California also suggested the FJB as an appropriate placement for Bion. (September 24, 1990 letter paragraph 5).

(15) Plaintiff's Conclusion of Law No. 10:

Defendants object to plaintiff's conclusion of law No. 10 on the ground that said conclusion is not supported by the evidence in this case and is not an accurate representation of the law pertaining to "related services" under 20

U.S.C. § 1401(1) (Supp.III 1985). The term "related services" is defined by the Act as follows:

> "(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." (20 U.S.C. § 1401(17)

In determining what is or is not a "related service", the court in *Clovis Unified v. Office of Administrative Hearings,* 903 F.2d 635 (9th Cir. 1990) held that this analysis must focus on whether the expense is necessary for educational purposes. (See 903 F.2d at p. 643) In the instant case, the Hearing Officer ordered the payment of Rent, Caretaker and Food Costs because it was necessary for Bion Jackson to relocate to the Los Angeles area in order to allow him to attend the FJB day program. This order was temporary until Bion could be accepted in the 24 hours residential program offered by the FJB. In *Jefferson County Bd. of Educ. v. Breen,* (supra) the 11th Circuit Court of Appeals affirmed the lower district courts finding that the board of education pay to the parents of a handicapped child, all out-of-pocket expenses incurred in placing their child in a treatment center which was ultimately determined to be an appropriate placement. (See 853 F.2d at p. 857) The court in *Clevenger v. Oak Ridge School Bd.,* 744 F.2d 514 (6th Cir.1984) stated:

> "Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an "appropriate" education. When only one is appropriate, then there is no choice." (744 F.2d at p. 517)

With these cases in mind, the administrative hearings held in this matter determined after hearing evidence on both sides that only one placement was appropriate for Bion, said placement being the FJB. In order to effectuate Bion's placement at the FJB, it was deemed necessary to temporarily incur the above referenced costs in order to effectuate the intent of the Act until such time when Bion could be admitted into the residential program.

(16) Plaintiff's Conclusions of Law No. 11 and 12:

Defendants object to plaintiff's conclusions of law No. 11 and 12 on the grounds that said conclusions are not supported by the evidence presented in this case and inaccurately represent the law on this issue. As in (15) above, defendants maintain that the expenditure of the types of costs listed in plaintiff's conclusion of law No. 11 and 12 are to be classified as "related services" under 20 U.S.C. § 1401(1) (Supp.III 1985). The Hearing Officer determined that such expenditures were necessary to provide Bion Jackson with an appropriate education at the FJB program located in Los Angeles California. Such determination was not made until after the Hearing Officer had also found that Penfield School was not an appropriate placement for Bion. In *Kattan v. District of Columbia*, 691 F. Supp. 1539 (DDC 1988) the court held that parents could receive cost of placement because their independent placement was appropriate and school's was not.

One gets the impression that the sole reason for plaintiff's objection to the payment of these types of related services is cost and budgetary considerations. The court in *Clevenger* (supra) held that cost considerations are not relevant when $88,000 per year residential placement is only appropriate program for seriously emotionally disturbed child. The evidence presented at the administrative hearing and on summary judgement in this matter amply demonstrates that the FJB was the only appropriate placement for Bion Jackson.

(17) Plaintiff's Conclusion of Law No. 13:

Defendants object to plaintiff's conclusion of law No. 13 on the ground that said conclusion pertaining to procedural compliance is vague and ambiguous in that the meaning of "procedural requirements of the IDEA" is not defined. In addition, said "compliance" is not supported by either the evidence presented in this case or the administrative hearing determination which found Penfield School was an inappropriate educational environment for Bion.

(18) Plaintiff's Conclusion of Law No. 14:

Defendants object to plaintiff's conclusion of law No. 14 on the ground that said conclusion is ambiguous in that one cannot determine which IEP plaintiffs are referring to in conclusion of law No. 14. The Hearing Officer determined after hearing ample evidence presented from both plaintiffs and defendants that:

> "In his school district placements, Bion has not benefitted educationally because he has not made satisfactory progress towards his IEP goals and objectives. The evidence does not

establish that Penfield School is a placement which will enable Bion to make this necessary progress." (AHD p. 14)

Plaintiff's conclusion of law No. 14 is also irrelevant and immaterial. Even if Bion's IEPs were reasonably calculated to enable him to receive educational benefits, the school district (Penfield School), as determined by the Hearing Officer, was not the educational placement wherein Bion could achieve his IEP goals.

CONCLUSION:

Defendants object to the form of plaintiff's proposed statement of uncontroverted facts and conclusions of law pursuant to Local Rule 14.6. Said objections are made in good faith and with the intent to correct the inaccuracies and misstatements in said statement of material facts and conclusions of law.

DATED: September 19, 1991.

Respectfully submitted,

ELLISON, HINKLE & BAYER

By /s/ David R. Ellison
DAVID R. ELLISON
Attorneys for Defendants,
Bion Jackson, a minor,
Elizabeth Jackson and
Richard Jackson

PROOF OF MAILING

STATE OF CALIFORNIA)
) ss
COUNTY OF VENTURA)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 5550 Telegraph Road, Post Office Box 6130, Ventura, California 93006.

On the date shown below, I served the within DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND STATEMENT OF CONCLUSIONS OF LAW on the interested parties by causing true copies thereof to be put in sealed envelopes addressed as follows:

Sharon A. Watt
Filarsky & Watt
1835 Knoll Drive
Ventura, California 93003

Barry Zolotar
Deputy General Counsel
California Dept. of Ed.
P.O. Box 944272
Sacramento, CA 94244-2720

I caused such envelope to be deposited in the mail at Ventura, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on the same day in the ordinary course of business. I am

aware that on motion of any party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 19, 1991, at Ventura, California.

/s/ Jeffrey D. Johnsen
JEFFREY D. JOHNSEN